INFORMATION MEMO

Continuation of Benefits

Learn how federal, state, and retiree continuation requirements for health, dental, flexible spending accounts, and employee assistance programs apply when offering benefit continuation for your employees.

RELEVANT LINKS:

Center for Consumer Information and Insurance Oversight: COBRA Continuation Coverage Q&A.

Title XXII of the Public Health Service (PHS) Act, 42 U.S.C. §§ 300bb-1 through 300bb-8.

IRS COBRA Regulations: 26 CFR 54.4980B-1 through 54.4980B-10.

Minn. Stat. § 61A.092.
Minn. Stat. § 62A.145.
Minn. Stat. § 62A.146.
Minn. Stat. § 62A.147.
Minn. Stat. § 471.61, subd. 2b.
Minn. Stat. § 299A.465.

I. Benefit continuation laws

There are at least four different continuation requirements to which a city’s benefit plan may be subject:

- Federal continuation (Consolidated Omnibus Budget Reconciliation Act, or COBRA) requires public sector employers to offer a temporary extension of group health coverage (referred to as “continuation of coverage”) to certain qualified beneficiaries (typically employees, former employees, spouses, former spouses, and dependent children) for up to 18, 29, or 36 months, depending on the qualifying event. COBRA establishes rules for how and when continuation coverage must be offered and provided, how employees and their families may elect continuation coverage, and what circumstances permit terminating coverage. Typical group health plans covered under COBRA are included below:

  - Medical
  - Dental
  - Vision care
  - Health reimbursement arrangements (HRAs)
  - Health flexible spending accounts (health FSAs)
  - Employee assistance programs (EAPs)
  - Certain wellness programs

  Note that if, on the day before a COBRA-qualifying event (for example, termination of employment), a qualified beneficiary is covered under the employer's separate health, dental, and vision plans, for example, then the beneficiary must be given the opportunity to continue coverage under all three plans. Thus, if active employees may elect coverage under these plans separately, then the COBRA beneficiary also may elect COBRA continuation separately for each of these options. COBRA does not cover plans providing only life insurance or disability benefits. Under Minnesota Statute §62A.21, in the event of a divorce, an employee’s insured dependent children and ex-spouse coverage will be continued until the earlier of the following dates:

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.
The date the insured's former spouse becomes covered under any other group health plan; or
The date coverage would otherwise terminate under the policy

The COBRA provisions of the Public Health Service Act (PHSA) covering state and local government plans are administered by the Department of Health and Human Services. Under “public sector” COBRA rules there is an exception for group health plans for an organization with fewer than 20 employees.

Minnesota insurance continuation law provides continuation of group health benefits (medical, dental, vision, and prescription drug plans), for periods equal to and often longer than COBRA periods, and group term life benefits, generally for up to 18 months, for all public-sector employers providing group health coverage or life insurance coverage to Minnesota resident employees. Regardless of whether federal COBRA applies, all group medical plans sponsored by cities in Minnesota are subject to Minnesota insurance continuation laws. [Minnesota insurance continuation laws apply directly to group insurance policies and the insurance carriers that issue those policies. However, Section 471.617 requires self-insured health plans sponsored by cities to comply with applicable provisions of Chapter 62A].

State law special retiree coverage requirements affect all local governments with one or more employees and define situations under which retirees may participate in the local government employer’s group hospital, medical, and dental insurances.

State law also provides for police and fire continuation benefits for peace officers and firefighters disabled or killed in the line of duty and for dependents meeting the eligibility criteria.

As an initial matter, a city must determine which laws apply to a specific benefit. For example, please review the chart below:

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<tr>
<th>Benefit</th>
<th>Federal COBRA</th>
<th>State Continuation</th>
<th>Police and Fire Continuation</th>
<th>Retiree Continuation</th>
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<tbody>
<tr>
<td>Group Medical Coverage</td>
<td>X</td>
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<tr>
<td>Group Dental Coverage</td>
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<td>Group Vision Coverage</td>
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<tr>
<td>Health Reimbursement Account (HRA)</td>
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<td>Health Flexible Spending Account</td>
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<td>Employee Assistance Program (EAP)</td>
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<tr>
<td>Wellness Program (stand-alone programs providing health care)</td>
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**With respect to the treatment of dental and vision coverage under police and fire continuation, Minnesota statute §299A.465 does not define “health coverage” and there are no court decisions or Attorney General opinions interpreting the phrase as used in this statute.

In some contexts, “health coverage” can mean medical coverage and in other contexts “health coverage” can mean any type of coverage treated as a group health plan under Federal law (which would include medical, dental, and vision coverage). Accordingly, it is not entirely clear how a court would interpret and enforce the statute if there were litigation. The Department of Public Safety (DPS) administers the program that reimburses employers required to provide continuation coverage under Section 299A.465. The DPS position is that the statute does not apply with respect to dental coverage, and DPS will not reimburse an employer for any dental premiums the employer paid on behalf of a disabled officer. Since the answer to whether to offer dental and vision continuation under Minn. Stat. §299A.465 is not entirely clear, cities will want to work with their legal counsel on this issue.

Once a city determines which laws apply to a specific benefit, the city should also take into consideration any requirements under a personnel policy and/or collective bargaining agreement (i.e., union contracts).

II. Qualifying events, length of continuation coverage, and type of coverage

Qualifying events are certain specified events causing an individual to lose his or her group health coverage. The type of qualifying event determines who the qualified beneficiaries are for that event and the period of time a plan must offer continuation coverage.

It is important to note not every loss of coverage under a group health plan is considered a qualifying event. For example, when an employee chooses to drop coverage for a dependent the city would not typically need to offer continuation coverage since the decision to drop coverage is not a qualifying event.

A. Qualifying Events

Under Minnesota insurance continuation law and COBRA, an employee and his or her dependents are allowed to continue coverage when one of the following qualifying events occurs:

1. Voluntary or involuntary termination and reduction in hours

Under Minnesota continuation law and COBRA, an employee and his or her dependents are allowed to continue coverage for up to 18 months after either of the following:

- A reduction in the employee’s work hours (including strikes or layoffs).*
- Voluntary or involuntary termination of the employee for reasons other than gross misconduct**

*The Patient Protection and Affordable Care Act (ACA) did not directly impact or change COBRA or Minnesota continuation obligations for employers, but other changes in related regulations will impact how and when employers offer COBRA coverage to employees. For example, prior to the ACA, most employers would remove an employee from the plan if the employee’s hours are reduced below the eligibility threshold and, if applicable, offer continuation coverage. Under the ACA, if the employee’s hours are reduced below 30 hours a week, the employee might, depending on the city’s approach to ACA penalty mitigation, remain benefit eligible for the remainder of the stability period if the employer is using the measurement and look-back method. Because of these complexities, cities should consult with the League and/or city attorney to ensure they are properly administering COBRA and Minnesota continuation coverage in light of the ACA.

**Gross misconduct does not have a specific definition in COBRA or state continuation laws. One federal court applied a standard by which the misconduct must be intentional, wanton, willful, deliberate, reckless, or in deliberate indifference to the employer’s interest. It is misconduct beyond minor policy violation. Because of this lack of a uniform definition, cities that choose not to extend COBRA or state continuation to an employee and their dependents due to gross misconduct should consult their attorneys prior to taking any action.

Minnesota law further requires employers to allow employees whose coverage would end due to voluntary or involuntary termination or a reduction in hours to continue group life insurance until coverage is obtained under another group plan or until 18 months after the qualifying event occurs, whichever is shorter. Note, because continuation of life insurance is provided only under Minnesota law and not COBRA, it is important to keep administration of the life insurance continuation separate from COBRA coverage administration. Therefore, it is strongly recommended that employers do not mention group term life insurance in their COBRA election notices.
Instead, a separate notice should be provided to employees informing them of their continuation rights under the employer’s group term life insurance plan. The statute identifies the basic information that must be included in such a notice. While the life insurance notice can be mailed with the COBRA election notice, they should be two separate documents.

Special rules may apply under Minnesota law in the event the reduction in hours or termination of employment involves a retiree or a police officer or firefighter.

2. **Instances of divorce, legal separation, or death of an employee**

COBRA provides a maximum of 36 months of continuation coverage in these instances.

In these situations, Minnesota law provides more comprehensive continuation rights to spouses and dependents than does COBRA.

In the instance of divorce, legal separation, or death of the employee, Minnesota law allows a spouse and/or dependent child to continue coverage indefinitely until either of the following:

- The surviving/former spouse obtains coverage under a group plan.
- Coverage would otherwise end under the plan.

Minnesota law also includes special continuation rights for the surviving spouse and children of a police officer or firefighter killed in the line of duty.

3. **Loss of dependent status**

Under COBRA and Minnesota continuation law, dependents that lose coverage because they have ceased to be a dependent (as defined under the plan) have **36 months** of continuation coverage.

4. **Covered employee enrolls in (and is entitled to) benefits under Medicare**

Medicare enrollment typically does not cause a loss of coverage under the terms of the plan. As a result, Medicare enrollment typically is not a qualifying event under COBRA. However, COBRA does provide that spouses and eligible children are entitled to 36 months of coverage from the date of the employee’s coverage under Medicare if such coverage begins within 18 months before the employee’s reduction in hours or termination of employment.
Minnesota continuation law provides for 36 months of continuation for the spouse and eligible children upon the employee’s enrollment in Medicare. The statute is not clear whether the employee’s enrollment in Medicare must trigger a loss of coverage for the spouse and children under the plan for the continuation right to arise.

5. **Instances of disability**

Minnesota continuation law and COBRA also differ in the instance of disability. Minnesota continuation law allows a disabled employee to continue coverage for the entire period of time during which he/she is totally disabled. Total disability is defined as the following:

- The inability to perform the duties of the employee’s own occupation within the first two years.
- After the first two years, the inability to perform any occupation for which the person is educated or trained.

Under COBRA, if an employee or his or her dependent is disabled, as defined by the Social Security Act, at any time during the first 60 days of COBRA coverage that is being received as a result of the employee’s termination of employment or reduction in hours, then coverage may be continued for up to 29 months (standard 18 months plus an additional 11 months). The employee or qualified beneficiary must generally notify the plan administrator within 60 days of the later of the date on which the Social Security Administration makes the disability determination, the qualifying event, the loss of coverage, or the date on which notice of the requirement is provided, but not later than the expiration of the 18-month COBRA coverage period. In the instance of family coverage, if the disabled member (the employee, spouse, or dependent child) does not elect to continue coverage for the additional 11 months, each other member can individually elect whether or not they wish to continue coverage for an additional 11 months.

In these cases, the definition of disability, the rights of the qualified beneficiaries (employee, spouse, and/or dependents), and the coverage allowed differ between Minnesota law and COBRA. Instances of disability should be reviewed carefully at the city level to ensure appropriate compliance.

Employees and former employees receiving disability benefits from a Minnesota public pension plan are entitled to retiree coverage. Furthermore, police officers and firefighters who become disabled in the line of duty are entitled to special continuation coverage rights under Minnesota law. These rules are discussed later.
B. Continuation coverage periods

1. COBRA rules

Under COBRA, continuation coverage begins either on the date of the qualifying event or, if provided in the plan, the date on which coverage would have terminated as a result of the qualifying event.

In general, continuation coverage ends under COBRA when one of the following occurs:

- Expiration of the maximum coverage period described in Section A above.
- Premiums are not paid on a timely basis.
- The employer ceases to maintain any group health plan.
- Coverage is obtained under another employer group health plan that does not contain any exclusion or limitation with respect to any pre-existing condition. (Note: Group medical plans were required to eliminate pre-existing condition limitations and exclusions by the 2014 plan year; however, stand-alone dental and vision plans may still contain such provisions).
- A beneficiary is entitled to Medicare. If a beneficiary has Medicare coverage before they elect COBRA, they can maintain both Medicare and the group coverage simultaneously. If they elect COBRA and subsequently become entitled to Medicare, then COBRA would terminate.

Under COBRA, the maximum coverage period following a reduction in hours or termination of employment may be extended for a spouse and children who are qualified beneficiaries upon the occurrence of a second qualifying event (e.g., death, divorce, child ceasing to be a dependent) during the initial 18-month coverage period.

a. FSA continuation

A special continuation coverage period applies under COBRA to most health FSAs if three conditions are met: (i) the maximum benefit under the plan does not exceed two times the employee’s salary reduction election for plan benefits for the year or, if greater, the employee’s salary reduction election for plan benefits for the year plus $500; (ii) all employees eligible for the plan must have other medical coverage available through the employer that is subject to HIPAA portability and the other medical coverage must allow enrollment at least on an annual basis; and (iii) the maximum annual COBRA premium for continuation coverage under the plan is equal to or greater than the maximum annual plan coverage amount.
If the special rule applies, the maximum duration of the continuation coverage under the health FSA is much shorter than the duration described in Section A.

If the account is “underspent” at the time of the loss, the maximum duration of COBRA is through the end of the plan year in which the loss takes place. If the account is “overspent” at the time of the loss, there is no requirement that COBRA be offered at all.

- An account is underspent when the remaining annual limit (elected annual limit minus expenses reimbursed as of date of COBRA qualifying event) is greater than the maximum COBRA premium (sum of monthly contributions for the rest of the plan year plus 2 percent) that can be charged for the rest of the plan year. For example, if the annual limit elected is $2,400 and the employee terminates employment on June 30th after having submitted $500 in claims, the account will be underspent because the remaining annual limit of $1,900 is greater than the COBRA premium that may be charged for the rest of the year (6 months x $200 + 2% = $1,224).

- An account is overspent when the remaining annual limit (elected annual limit minus expenses reimbursed as of date of COBRA qualifying event) is less than the maximum COBRA premium (sum of monthly contributions for the rest of the plan year plus 2 percent) that can be charged for the rest of the plan year.

Neither COBRA nor Minnesota continuation law requires an employer to offer continuation coverage under a dependent care flexible spending account. Some employers, as a matter of plan design, give terminating employees an opportunity to spend down the balance of their accounts, but that is not required by federal or state continuation law.

b. HRA continuation

Under most HRAs, the loss of coverage occurs upon termination of employment rather than at the end of the month in which the employment terminates. However, the HRA’s termination provisions are a matter of plan design. As a result, some HRAs that are integrated with the employer’s group medical plan might be designed such that coverage under the HRA extends until the last day of the month in which the participant’s employment terminates. A city will need to review the HRA plan document to determine when coverage ends under its HRA.

2. Minnesota continuation law

Under Minnesota continuation law, continuation coverage begins on the date when coverage would have terminated as a result of the qualifying event.
In general, continuation coverage ends under Minnesota continuation law when one of the following occurs:

- Upon expiration of maximum coverage period described in Section A above.
- When premiums are not paid on a timely basis.
- The date on which coverage would otherwise terminate under the plan (except in cases of disability). Minnesota law does not further identify the events on which coverage would otherwise terminate under the plan. One such event would be if the employer terminates the plan. Cities should consult an attorney when determining whether Minnesota continuation may be terminated upon the occurrence of any other events.
- When coverage is obtained from another group health plan (except in cases of disability). Minnesota continuation law only references “group health plan,” but that term is not defined. There is an argument Medicare constitutes a group health plan, but since Minnesota law does not expressly authorize termination of a qualified beneficiary’s continuation coverage when the individual enrolls in Medicare, a city should consult an attorney if a qualified beneficiary enrolls in Medicare after electing continuation coverage.

Minnesota continuation law does not expressly address second qualifying events. However, in general, each Minnesota continuation statute applies independently, so that if continuation coverage is being provided under one statute (e.g., the statute that applies upon a reduction in hours or a termination of employment) and an event covered by a second statute occurs (e.g., a divorce), additional continuation coverage will be required under the second statute.

C. Type of Coverage

In general, a person entitled to continuation coverage under Minnesota insurance continuation law and/or COBRA is entitled to continue the coverage he/she had at the time of the qualifying event. However, the COBRA regulations include a special rule under which COBRA participants are provided the same open enrollment rights that active eligible employees enjoy. The regulations state: “An open enrollment period means a period during which an employee covered under a plan can choose to be covered under another plan . . .” Therefore, during a plan’s annual open enrollment period, COBRA participants should be offered the opportunity to (1) enroll or disenroll dependents; (2) change coverage options available under the group health plans in which they are enrolled; and (3) enroll in group health plans in which they are not currently enrolled.
Despite the broad requirements reflected in the IRS COBRA regulations, some employers offer only restricted open enrollment rights to COBRA participants on the basis that the COBRA statute does not require the group health plan to offer open enrollment rights and the IRS exceeded its authority when it granted open enrollment rights to COBRA participants through the regulations. Under this more aggressive approach, an employer might allow COBRA participants to make changes only within the plan(s) in which the COBRA participant is enrolled or may limit the right to enroll in an additional plan only if the COBRA participant had coverage under that plan at the time of the qualifying event. A city considering this second approach should consult an attorney.

In general, Minnesota continuation laws do not require employers to offer open enrollment rights to continuation participants. In general, the type of coverage available under Minnesota continuation laws is the coverage the employee and dependents had at the time of the qualifying event (as that may be modified from time to time for active employees).

III. Notice requirements

A. Initial COBRA (general) notice

Group health plans must give each employee and his/her spouse who becomes covered under the plan a general notice describing COBRA rights. The general notice must be provided within the first 90 days of coverage. It’s important for cities to keep in mind if a single, covered employee later marries and adds his/her spouse to the plan, then at that point the spouse joining the plan must also be provided with an initial notice.

The Department of Labor (DOL) has developed a model general notice cities may use to satisfy the general notice requirement, but the model includes optional provisions, so it is important for cities to work with their city attorney or benefits consultant to customize this notice to the city’s own plan design.

The DOL provides for a first-class mailing to the last known address as an acceptable delivery method. A single notice may be provided to the employee and the covered spouse if they reside together. A “best practices” suggestion is for cities to include this notice in its new enrollment packets, if they are mailed to employees, to ensure that the required information is provided to all new employees in a timely manner.
Although the DOL electronic disclosure rules also apply to COBRA notices, which means that cities have the option of distributing the initial COBRA notice electronically, compliance the electronic disclosure rules can be difficult to achieve, especially with respect to covered spouses. A city wishes to distribute notices electronically should work with their attorneys to ensure compliance.

B. Election notices (COBRA and state)

When a qualifying event occurs, COBRA requires the following notices be provided within the allotted time frame:

- The **employer** must notify the plan administrator of an employee’s reduction in hours of employment, termination, or death. This notice is required only if the employer does not fulfill the role of plan administrator (which is not the case in most situations). The notice must be provided within 30 days of the event or, if the plan provides that continuation coverage and notice periods begin on the date of the loss of coverage, within 30 days of the date on which coverage is lost.

- The **employee** or **qualified beneficiary** must notify the plan administrator of a divorce, legal separation, or a child losing dependent status. The deadline for the notice is the deadline provided under the plan, which may not be shorter than 60 days of the later of the event, the loss of coverage, or the date on which the plan informs the employee/qualified beneficiary of the obligation to provide the notice. Additional notices may be required to be provided by qualified beneficiaries in certain events (e.g., a qualified beneficiary is determined to be disabled or a qualified beneficiary becomes covered under another group health plan or Medicare, etc.).

- The **plan administrator** must notify a qualified beneficiary of their right to continue coverage within 14 days of being notified by the employer or the employee/qualified beneficiary that a qualifying event has occurred. However, if the plan administrator and the employer are the same (which is typically the case), then the notice required upon a termination of employment, reduction in hours, or death must be provided within 44 days of the event or, if the plan provides that continuation coverage and notice periods begin on the date of the loss of coverage, within 44 days of the date on which coverage is lost.

COBRA requires the plan administrator to distribute an election notice to each qualified beneficiary (which may include the employee, the covered spouse, and the covered dependent children). The DOL COBRA regulations provide that a single election notice, addressed to a covered employee and covered spouse, is sufficient if they reside at the same address.
Furthermore, a notice furnished to a covered employee or the covered employee’s spouse constitutes valid notice to covered dependent children who are qualified beneficiaries for any children who reside with the person to whom the notice is provided (on the basis of the most recent information available to the plan). Separate notices are clearly required when the qualified beneficiaries live at different addresses.

Under COBRA, a qualified beneficiary has 60 days from the date of the qualifying event or the date of the plan administrator’s notice, whichever occurs later, to elect to continue coverage. COBRA provides that for family coverage, if the employee declines to continue coverage, each dependent has the option of continuing individual coverage.

An election by the employee to continue coverage may be deemed to be an election for all dependents residing with the employee.

In cases of a reduction in hours or termination of employment, Minnesota insurance continuation law requires the employer to notify the employee of his/her rights to continuation coverage within 14 days following the reduction in hours or termination of employment. This deadline applies with respect to both group health plans and group term life insurance.

Notice must be in writing and sent by first-class mail to the employee’s last known address. The employee must elect continuation coverage within 60 days from the later of the date coverage would otherwise terminate or the date on which the employee receives the election notice. Qualified beneficiaries other than the employee do not have an independent right to elect continuation coverage under this law if the employee does not elect to continue the coverage.

Other Minnesota continuation laws (i.e., those that apply upon divorce, death, disability, etc.) do not specifically address election notices and the timing of elections by qualified beneficiaries. Cities should develop an approach to offering Minnesota continuation in these circumstances in consultation with an attorney.

A notice of an individual’s right to continue coverage should describe their rights under Minnesota continuation law and COBRA, when necessary.

C. COBRA notice of unavailability

If an individual provides notice that an event has occurred that might entitle him/her to COBRA continuation coverage (or an extension of COBRA continuation coverage), but the individual is not entitled to continuation coverage, the plan administrator is required to send out a notice of unavailability of COBRA coverage explaining the reason(s) COBRA is not available.
This notice must be sent within 14 days after the request is received and must explain the reason for denying the request for coverage. The Department of Labor does not provide a model denial notice for unavailability.

An example of a situation where a notice of unavailability would apply is when the employee/qualified beneficiary provides notice of a qualifying event after the applicable deadline. Another example is if a recently divorced employee gives notice she is required to cover her former spouse under the city’s group health plan pursuant to a court order, but the former spouse was not covered under the city’s plan, the plan administrator must notify the employee her former spouse does not have COBRA rights because the soon to be ex-spouse was not a covered dependent at the time of the qualifying event.

D. **COBRA notice of termination of coverage**

If a qualified beneficiary fails to pay premiums, becomes entitled to Medicare coverage, or becomes covered under another employer’s group health plan, a plan administrator may terminate continuation coverage earlier than expiration of the COBRA continuation period and must provide the qualified beneficiary a notice of early termination.

The notice must be given as soon as practicable after the decision is made to terminate coverage, and it must describe the date coverage will terminate, the reason for termination, and any rights the qualified beneficiary may have to elect alternative group or individual coverage, such as the right to convert to an individual policy. The Department of Labor does not provide a model termination notice.

**IV. Paying for continuation coverage**

Those individuals continuing coverage under Minnesota law or COBRA may be required to pay premiums for coverage.

In most cases, premiums may not exceed 102 percent of the cost (the entire premium amount (including any contribution formerly provided by the employer) plus an extra 2% for administrative costs) for active employees. For insured plans, the cost is the premium charged by the insurance carrier. For self-insured plans, the cost generally is the cost of providing coverage determined on an actuarial basis or using historical cost information.

However, disabled employees eligible under the Minnesota continuation law are not required to pay more than 100 percent of the premium. Also, a special rule applies under Minnesota continuation law that limits the ability to charge a premium to an ex-spouse following divorce in certain cases.
When the qualifying event involves divorce, the city should consult an attorney regarding the special premium rules that apply. Special rules also apply for retirees and police officers and firefighters disabled or killed in the line of duty as further discussed below.

Furthermore, if any qualified beneficiary is disabled according to Social Security, COBRA allows for premiums to be increased to 150 percent for months 19-29. However, in the instance of family coverage, if the disabled individual does not elect to continue coverage but an individual family member wishes to continue coverage for the additional 11 months, the plan can only charge 102 percent of the total premium.

Minnesota continuation law does not include many specifics regarding the timing of premium payments. In most cases, premium payments must be made on a monthly basis and employers are not required to provide any grace period (although many employers follow COBRA guidelines in this regard). Also, in most cases there is no special deadline for payment of the first month’s premium. However, in the case of a death of an employee, the surviving spouse and dependents must pay the initial premium within 90 days from the date of being notified of the obligation to pay the premium. Furthermore, a 30-day notice must be provided to the survivors before cancellation of coverage for failure to pay premiums. Therefore, cities may want to send notice as soon after the premium was due to avoid having to continue coverage beyond the 30-day period.

COBRA requires that qualified beneficiaries be allowed to pay premiums on a monthly basis. However, the employer may permit (but cannot require) payment of the premiums at other intervals, such as weekly.

Under COBRA, premiums payments must be made within the following time frames:

- The city may discontinue coverage if the former employee fails to make the premium payment within the deadline provided under COBRA. (If the premium payment is not received by the first day of a period of coverage, but received within the grace period for that period of coverage, the plan has the option to cancel the coverage until payment is received and then reinstate the coverage retroactively back to the beginning of the period of coverage. Failure to make payment in full before the end of a grace period could cause loss all COBRA rights. Please also note that if the amount of a payment made to the plan is incorrect, but is not significantly less than the amount due, the plan is required to provide notification of the deficiency and grant a reasonable period (for this purpose, 30 days is considered reasonable) to pay the difference.).
- The first premium payment must be made within 45 days after the date of electing coverage.
• After the initial payment, premiums are due on the date stated in the plan with a minimum 30-day grace period.
• The due date may not be prior to the first day of the period of coverage.
• The plan is not obligated to send out monthly premium notices.

Cities should ensure that the election notice contains all of the above information, especially the consequences late payment or nonpayment.

V. Retiring employees

Minnesota law requires state and local governments to allow some former employees and their dependents to continue to participate indefinitely in the employer-sponsored hospital, medical, and dental insurance group they participated in immediately prior to retiring as long as they are either of the following:

• Receiving disability benefits or a retirement annuity from a Minnesota public pension plan (e.g., PERA, TRA) other than a volunteer firefighter plan.
• Have met the age and service requirements necessary to receive an annuity from a public pension plan, but have opted not to draw upon the funds at the time they retire.

The statute does not specifically mention vision coverage. However, vision coverage could be considered medical coverage for purposes of the statute.

City employees who retire before age 65 (early retirees) must be grouped with active employees for purposes of coverage (i.e., they must be offered the same group health and/or dental plans as offered to active employees) and premiums (i.e., the retiree’s premium must be based upon the rates applicable to active employees).

However, when an early retiree turns 65, when an employee retires at or after age 65, or when a retiree under age 65 enrolls in Medicare Parts A and B due to disability, the city still must offer the option of indefinite coverage. However, the city may at this point decide to offer the retiree a different benefit plan at a different premium rate than what is offered to active employees.

All employees terminating employment, including retirees of any age, have rights to continue coverage under federal COBRA and Minnesota insurance continuation laws. These rights are in addition to any rights a retiree has under the Minnesota retiree continuation law.

A. Changing city contributions for retiree benefits

Two Minnesota statutes primarily govern retiree health coverage.
Minn. Stat. § 471.61. prohibits governmental entities from obligating themselves to pay retiree health benefits beyond the duration of the collective bargaining agreement. Minn. Stat. § 471.61, subd. 2b, addresses the availability of continuation coverage for retirees. Minn. Stat. § 471.61 also recognizes a governmental entity’s ability to pay for retiree health coverage—although there is no requirement under Minn. Stat. § 471.61 that the city contribute towards the cost of retiree continuation coverage.

In an effort to reduce costs, many cities have considered reducing or eliminating the amount they contribute towards retiree benefits. However, this option should be carefully considered, as it could be problematic for cities—especially when the discussion turns to eliminating or reducing benefits for city retirees covered under a collective bargaining agreement.

A 2005 Minnesota Court of Appeals case illustrated how making the decision to eliminate employer contributions towards retiree benefits may impact cities.

In Norman v. Housing and Redevelopment Authority of Chisolv, the collective bargaining agreement in place at the time of the employee’s retirement provided the HRA would continue to pay the retiree’s health insurance premiums indefinitely. Subsequently, the collective bargaining agreement expired and the HRA discontinued paying the retiree’s insurance premium, relying on Minn. Stat. § 179A.20.

The Minnesota Supreme Court held a public employer may obligate itself in a collective bargaining agreement to pay retiree health care premiums indefinitely. Where the HRA did not limit its obligation to pay benefits and the employee retired under a collective bargaining agreement, the Minnesota Supreme Court said the HRA could not discontinue its contribution toward the insurance premium for the employee. In this case, it did not matter the contract later expired or that the union eventually decertified.

Issues to consider:

- If changing the city’s contribution towards retiree benefits, will the change impact current retirees? If so, consider union contract and/or personnel policies in force at the time the employees left the city. Was a promise made to continue those contributions indefinitely?
- Consider the impact of Governmental Accounting Standards Board (GASB) accounting standards for non-pension retiree benefits, such as retiree health benefits.
- Work with union representatives to begin discussing any potential changes needing to be made to the city’s contribution structure as a result of the GASB accounting standards.
• Carefully evaluate options for implementing a post-employment health care savings plan and make sure the plan complies with appropriate IRS regulations and health care reform rules.

• If considering a post-employment health care savings plan, be sure to first negotiate this benefit with your unions and/or change your personnel policy to reflect this new benefit prior to the effective date of the program.

B. Rights and responsibilities

Employers must notify employees by their retirement date of their right to continue coverage under Section 471.61. It is a good idea to provide the retiree written notice of their right to continue coverage prior to retirement. While the Minnesota retiree continuation coverage statute does not specifically say a written notice is required, COBRA and the Minnesota insurance continuation statute clearly require a written notice. Also by providing a written notice, the city is able to better outline for the retiree options in detail. It is also a good idea to ensure the city receives the election form back from the retiree indicating their preference to continue or waive retiree continuation of their benefits.

Employees must notify the employer in writing of their intent to continue to participate in the group plan(s) within 60 days of the date of retirement or the date of being notified of rights to continue their coverage, whichever occurs later.

Generally speaking, if a retiree does not elect to stay under the group plan within the allowed period of time, he or she does not have the right to re-enter the employer’s group insurance program at a later date. However, a city typically can choose to provide retirees with rights to continue coverage that are greater than the rights granted by the Minnesota retiree continuation law. A city wishing to provide greater rights should consult with the city’s legal counsel and its insurance carriers.

If a retiree received dependent coverage prior to retirement, then dependents must be allowed to continue coverage in the same manner as the retiree. If the retiree did not have dependent coverage at the time of retirement, he or she may not later add dependent coverage (unless COBRA also applies and/or the employee is allowed to add a dependent through HIPAA special enrollment).

The retiree may elect to drop dependent coverage at any time while retaining individual coverage, but may not elect to drop his or her own coverage while retaining coverage for dependents.
Retirees may be required to pay the entire premium for coverage for themselves and any dependents unless the employer has assumed some contractual obligation to make these payments, such as under a collective bargaining agreement or some other personnel contract. Minnesota retiree continuation law does not authorize a city to add an additional 2% to the premium. Special provisions for employer payment of premiums are also found under Minn. Stat. § 299A. 465 relating to police officers and firefighters.

Minnesota law also provides that payments be made according to the time frame outlined in the federal continuation law, COBRA. The city may discontinue coverage if the retiree fails to make the premium payment within the deadline provided under COBRA. COBRA requires premium payments be made as follows:

- The first premium payment must be made within 45 days after the date of electing coverage.
- After the initial payment, premiums are due on the date stated in the plan with a minimum 30-day grace period.
- The due date may not be prior to the first day of the period of coverage.
- The plan is not obligated to send out monthly premium notices.

**C. Potential age discrimination issues in retiree benefit plans**

In 2007, the Equal Employment Opportunity Commission (EEOC) issued final regulations relating to the application of the Age Discrimination in Employment Act (ADEA) to retiree health plans.

The final regulations allow employer-sponsored retiree health benefits to be changed, reduced, or eliminated when retirees become eligible for Medicare, without violating the ADEA. These final regulations became effective December 26, 2007. The previous EEOC policy provided retiree health plans which reduce or eliminate benefits based on age or Medicare eligibility violate the ADEA.

This prior policy not only provided a disincentive for cities to offer retiree benefits to employees but was also in direct conflict with Minn. Stat. § 471.61, which allows cities to draw a distinction between plan designs and rates offered to early retirees versus those offered to 65+ retirees.

Cities should be very careful when creating any new early retiree programs or entering into any new contracts providing different benefits for retirees, especially in situations other than when the differences are based solely upon the retiree’s eligibility for Medicare.
Providing greater benefits to younger retirees than to older retirees, such as an early retiree incentive paying for all or part of retirees’ health premiums only up to a certain age, may be cause for concern under the ADEA.

In addition, the Minnesota Human Rights Act (MHRA) could be used as the basis for an age discrimination claim if a city provides greater benefits to younger retirees.

**VI. Police & fire continuation**

Minnesota law provides continued health insurance coverage for peace officers and firefighters disabled or killed in the line of duty and for dependents meeting the eligibility criteria. It also provides continued health insurance coverage to the dependents of volunteer firefighters (and their dependents) killed in the line of duty. The scope of “health insurance” coverage to which the statute applies is unclear.

The city must continue coverage for the disabled officer and firefighter (and, if applicable the officer’s or firefighter’s dependents), and is also responsible for continued payment of the city’s contribution for the continued health insurance coverage if:

- PERA determines the peace officer or firefighter is eligible to receive a duty disability benefit pursuant to Section 353.656 of the Minnesota Statutes; or
- The peace officer or firefighter suffers a disabling injury that results in the officer’s or firefighter’s retirement or separation from service and has been determined by PERA, upon request of the peace officer or firefighter, to have met the duty disability criteria contained in Section 353.01, subd. 41 of the Minnesota Statutes. A peace officer or firefighter can request such a determination if (1) he/she ineligible for a duty disability benefit because he/she has met the requirements for a retirement annuity under Section 353.651, subd. 1; (2) he/she retires pursuant to PERA’s early retirement rules; or (3) is a member of a local police or salaried firefighters relief association and qualifies for a duty disability benefit under the terms of the relief association’s plan.

Coverage must continue for the disabled officer and firefighter (and, if applicable the officer’s or firefighter’s dependents) until the officer or firefighter reaches the age of 65 (or would have reached age 65 if deceased). However, coverage for dependents does not have to be continued after the person is no longer a dependent.

Note, for purposes of this statute, an individual is not considered a dependent if the individual is covered under another group health plan.
If the officer, firefighter, or volunteer firefighter dies in the line of duty, and he/she had dependent coverage at the time of death, then the city must offer continuation coverage to the surviving dependents and continue to make the city’s contribution for the coverage. In addition, the surviving spouse is entitled to continuation coverage even if he/she was not covered under the plan at the time of the officer’s/firefighter’s death if the spouse was eligible at that time or any time thereafter. Coverage must be provided to the surviving spouse until he/she attains age 65 or becomes covered under another group health plan.

Coverage must be provided to the surviving dependents until they attain age 26 (except as otherwise provided in Minn. Stat. § 62L.02, subd. 11) or become covered under another group health plan.

Special requirements apply in situations in which a volunteer firefighter dies in the line of duty and the city did not offer group health insurance to its volunteer firefighters. The city in that case is still obligated to provide a benefit to the surviving spouse and dependents as further described in Minn. Stat. § 299A.465, subd. 2a.

Cities can apply for partial reimbursement of the employer’s share of health care costs through the Public Safety Officer Benefits Program. While the state originally provided reimbursement to cities for their portion of the contribution the city must continue to pay, the number of eligible claims and the cost of providing health insurance has increased substantially over time and caused a deficiency in the fund created to provide this benefit. As a result, a majority of the cost of providing these benefits is currently being borne by cities.

When working with a coverage request under Minn. Stat. § 299A.465, cities should consider the following:

- By way of example, there is uncertainty regarding whether a disabled officer/firefighter must have been enrolled in the city’s plan at the time he/she became disabled in order to receive continued health coverage under the statute. The statute indicates the employer “shall continue to provide health coverage” for the disabled officer/firefighter and (if the officer/firefighter was receiving dependent coverage at the time of the injury) his/her dependents. This language from the statute suggests an employer has an obligation to an officer/firefighter who has become disabled in the line of duty only if he/she had coverage at the time the disability arose. If the officer/firefighter was not enrolled in the employer’s plan, there is no coverage to “continue.” This interpretation is based, in part, on the continuation coverage concepts found in different laws. For instance, an employee is entitled to COBRA continuation coverage only if the individual is covered under the plan at the time of the qualifying event.
Cities must usually continue benefits under state law regardless of whether Minn. Stat. § 299A is applicable, so remember to offer other types of continuation coverage to which the employee and/or dependent is entitled under federal and/or state law.

The requirements imposed by the statute are, in some cases, not well defined. Cities should consult an attorney on any applications of the law they believe are not in line with the intent of the law and on any situations that are not specifically addressed in the statute. Similarly, the right to continuation of coverage under Minnesota insurance law (e.g., Minn. Stat. § 62A.17) applies only to employees who are covered under the plan at the time of termination. Some disabled officers/firefighters have, however, taken the position the employer must continue to offer coverage to the disabled officer/firefighter regardless of whether he/she was enrolled at the time of the injury. There have been at least two relevant court decisions, either of which resolve the issue for all cities. First, the Minnesota Court of Appeals in 2009 reversed a Hennepin County District Court’s determination that a firefighter had to have his own health insurance coverage through the employer at the time of the disability in order to be entitled to continuation rights under Section 299A.465. The Court of Appeals found it was sufficient that the firefighter was covered under the employer’s plan as a dependent at the time of the injury (because the firefighter’s spouse was also employed by the employer and had enrolled in family coverage under the plan). The Court of Appeals specifically declined to address the issue of whether the firefighter would have rights to continuation coverage under the statute even if he had no coverage at time of the injury or termination of employment. More recently, late last year the Anoka County District Court ruled in favor of disabled officers who had previously waived the employer’s coverage and were receiving cash in lieu of coverage. That District Court held that a disabled officer is entitled to continuation rights under Section 299A.465 regardless of whether the officer was enrolled in the employer’s health plan at the time of the injury or termination of employment. Although the court noted the fact the employer in that case provided cash in lieu of coverage (potentially suggesting that cash in lieu could be a distinguishing factor), it appears the District Court would have reached the same conclusion even if no cash in lieu was provided by the employer.

Contact the League about any situations in dispute so we can track these cases throughout the state.

Assist PERA by providing as much information as appropriate about the employee’s disability pension application. If an employee applies for a determination that he/she has met the duty disability criteria, ensure the employee has met all of the criteria under the law and, if not, consider contesting the case.
VII. Applying the requirements

A. General approach

Most employers are required under federal and state law to offer employees continuation of group health benefits for a period of time after they leave employment.

Fully insured plans are required to comply with both COBRA and Minnesota insurance continuation law. Self-insured plans typically are subject to COBRA, but not state insurance continuation laws. Regardless of plan structure, most cities are required to comply with Minnesota insurance continuation law as well as COBRA requirements for certain plans because they either are one of the following:

1. A fully insured group plan.
2. Self-insured under Minn. Stat. § 471.617, which requires compliance with Minnesota insurance laws.

Furthermore, cities are also required to comply with other Minnesota laws, such as Minn. Stat. §§ 299A.465 and 471.61, which may apply regardless of whether the plan is fully insured or self-insured.

A city should develop a procedure for handling continuation coverage elections in situation in which multiple laws apply. Options include treating any election of continuation coverage made by the qualified beneficiary as an election of continuation coverage under each applicable law or requiring separate and independent elections of each type of continuation coverage.

In many cases, Minnesota law is more beneficial for employees and dependents than COBRA. Generally, if a qualified beneficiary or continuation participant has rights under both laws and a city is complying with Minnesota continuation requirements, then the city will be in compliance with COBRA. Where Minnesota law is silent, COBRA requirements apply. Furthermore, in situations where Minnesota law and COBRA directly conflict, typically the city should follow the law most beneficial to the employee or the dependent to the extent his/her rights under a particular law have not been exhausted or waived.

Since COBRA and Minnesota continuation laws are not uniform, the requirements of each law should be identified and then the application determined based on your city’s specific situation.

It is also a good idea to consider tracking each of the continuation requirements separately—when you’ve met one set of requirements, then you check the other to see if there are any additional requirements that must be met.
In some cases, COBRA will end first leaving only state continuation and vice versa.

B. Differences in continuation requirements

The various laws governing the continuation requirements were not written to coordinate with each other. In fact, many of the provisions differ from one another.

The following discussion provides some examples of the areas in which these differences exist. Before making any determinations on how to handle these situations, it is important for the city to first review their collective bargaining agreements and/or personnel policies to see if a policy has already been established on how these issues will be handled. Also, it will be important for the city to review their COBRA procedures to determine if there are any changes needed in order for the city to take one approach over another.

1. Who has the right to elect continuation coverage

Under Minnesota insurance continuation law, the employee is the only person entitled to make an election to continue coverage when employment terminates – the employee’s dependents covered under the plan do not have an independent right to elect to continue coverage. If the employee does not continue coverage, then coverage for the employee’s covered dependents also does not continue. Under federal COBRA continuation requirements, however, each covered individual is entitled to an independent election to continue. For example, an employee may waive COBRA coverage while his or her spouse elects to continue coverage.

A similar issue exists with respect to Minnesota retiree continuation coverage. Under retiree continuation, the employee retiring is the person entitled to continue the coverage. In addition, the coverage the retiree had at the time of retirement is the coverage the retiree may elect to continue. For instance, if the employee had single coverage, then that is the coverage he/she may continue—the former employee may not subsequently add family members if they were not covered at the time of retirement except in certain limited circumstances in which special enrollment is available under HIPAA. On the other hand, under COBRA, a COBRA participant could add family members to the applicable benefit plan during the COBRA period to the same extent that active employees could add family members to that plan (e.g., adding dependents during open enrollment) and to the extent required under HIPAA special enrollment.
When COBRA and Minnesota continuation law both apply to a qualifying event involving the employee and the employee’s spouse and dependents (e.g., termination of employment by a retiree), and an election is made only by the former employee’s spouse and/or dependents, the continuation coverage provided to the spouse and/or dependents will be governed solely by COBRA. Any additional rights available only under Minnesota continuation law (e.g., extended coverage under Section 471.61) will not be available.

2. An employee retires and elects to continue dental benefits but not medical benefits. During open enrollment, the retiree wants to opt back into medical benefits.

The response to this second scenario depends on the how the city is coordinating the various continuation requirements. When a person leaves the city’s employment due to retirement, a city will have to address COBRA, Minnesota insurance continuation, and Minnesota retiree continuation requirements.

There is no requirement under Minnesota retiree continuation (or Minnesota insurance continuation) that a person be allowed to add coverage they did not have prior to retirement. There is also no requirement that a person be permitted to add coverage they have let lapse (e.g., they did not want medical insurance so they did not pay the premium for it once they retired). Under Minnesota retiree continuation requirements, there would be no ability for the retiree to make the requested change to re-enroll in the medical plan. However, the retiree may have such a right under COBRA (depending on the approach the city takes with respect to COBRA special enrollment rule as discussed previously in this memo).

If the city takes the conservative approach with respect to COBRA’s special enrollment rule, then the period of time during which COBRA is available (the first 18 or 29 months following retirement depending on whether the COBRA disability extension applies), the employee will be permitted to add other coverages during open enrollment. If the city takes this approach and allows the retiree to enroll in the medical plan during an open enrollment period, then medical coverage technically is available only until COBRA is exhausted. At the end of COBRA period, the medical coverage under COBRA should end, but coverage under the dental plan, which was maintained during the entire time, would continue indefinitely past the COBRA period under Minnesota retiree continuation requirements. If the city were to take the aggressive approach under the COBRA open enrollment rule, then the employee would not be able to enroll in the medical plan during the open enrollment period.
VIII. Penalties

The COBRA provisions applicable to cities through the PHSA do not contain any specific penalty provision like those applicable to private sector employers under the Employee Retirement Income Security Act (ERISA).

Furthermore, the provisions of the Internal Revenue Code that impose excise taxes for certain violations of COBRA also do not apply to cities. However, a qualified beneficiary may bring a lawsuit to recover COBRA coverage under the PHSA.

Under Minnesota insurance continuation law applicable to group health plans in cases of a reduction in hours or termination of employment, if an employer fails to provide appropriate notices or forward appropriate payments to the insurer or trust administrator, and the employee loses coverage as a result, then the employer is liable for the employee’s coverage to the same extent as if coverage were still in effect. Under the Minnesota continuation law applicable to group term life insurance, the employee’s election period does not begin to run until the employer provides notice of the election rights. If the employee dies before expiration of the election period, the employee is deemed to have elected continuation coverage. Insurance carriers may refuse to pay the claim if the employer failed to provide the required notice, leaving the employer potential liable for the benefit. The other Minnesota continuation laws do not contain specific penalty provisions. However, in all cases, a qualified beneficiary would likely be able to bring a lawsuit seeking the continuation coverage.

IX. Further assistance

This memo was developed in cooperation with a benefits attorney, but is not intended to constitute legal advice. The laws discussed in this memo are quite complex and it is not possible to address in this document all of the legal and compliance issues that may arise with respect to continuation coverage. Because each situation may be different, you should consult an attorney when dealing with a specific situation.

The U.S. Department of Health and Human Services (HHS) is responsible for COBRA enforcement for federal, state, and local entities. However, the U.S. Department of Labor also provides guidance, which HHS may rely on for public sector entities.

If you have any questions relating to this or any other benefits-related issue, please contact the League’s Human Resources Department.
### APPENDIX A: Continuation of Benefits Summary Chart

<table>
<thead>
<tr>
<th>Qualifying Event</th>
<th>Qualified Beneficiary</th>
<th>Federal COBRA</th>
<th>Minnesota Continuation Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary or involuntary termination (other than for gross misconduct).</td>
<td>Employee, Spouse, Dependent Child</td>
<td>18% months at 102% of premium</td>
<td>Same as COBRA</td>
</tr>
<tr>
<td>or Reduction in hours (including strikes or layoffs)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divorce/legal separation; or Death of covered employee</td>
<td>Spouse, Dependent Child</td>
<td>36 months at 102% of premium</td>
<td>Under another group plan or date coverage would otherwise end</td>
</tr>
<tr>
<td>Loss of “dependent child” status</td>
<td>Dependent Child</td>
<td>36 months at 102% of premium</td>
<td>Same as COBRA</td>
</tr>
<tr>
<td>Employee entitles to Medicare</td>
<td>Spouse, Dependent Child</td>
<td>36 months at 102% of premium</td>
<td>Same as COBRA</td>
</tr>
<tr>
<td>Disability</td>
<td>Employee, Spouse, Dependent Child</td>
<td>18 months at 1-2% of premiums, additional 11 months at 150% of premium</td>
<td>Totally disabled at 100% of premium</td>
</tr>
</tbody>
</table>
## Appendix B: Approaches to COBRA’s Open Enrollment Rule

<table>
<thead>
<tr>
<th>General Approach to Open Enrollment</th>
<th>Application of Approach</th>
<th>Special Steps in Support of Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All benefit options available to the former employee or retiree</strong></td>
<td>Treat COBRA beneficiary and retiree the same as a person not on COBRA (i.e. same as an active employee). A former employee receiving continuation coverage under at least one group health plan would be allowed to enroll into any group health plan offered by the city, even a plan that he/she had not continued at the time of separation from employment. For retirees, this option would only apply during an open enrollment period that occurred during the first 18 months of continuation.</td>
<td>Provide single written notice of continuation rights covering all group health plans in which the employee was enrolled. If a retiree, coordinate retiree continuation requirements with COBRA – remember to provide written notice of COBRA and retiree continuation rights. If the retiree enrolls in a plan at open enrollment with respect to which the retiree had not initially elected continuation coverage, the continuation coverage is terminated upon expiration of COBRA. Coverage under the plan that was initially elected by the retiree would be available indefinitely.</td>
</tr>
<tr>
<td><strong>Consider separate types of benefits</strong></td>
<td>Treat different plan options as entirely separate benefits. A former employee would NOT be allowed to add something during open enrollment that he/she had not elected to continue. However, within the plan he/she had continued, the former employee would be able to change among different option available (e.g. when more than one medical plan option is available).</td>
<td>Provide separate continuation notices and election forms for each group health plan available through the city in which the employee was enrolled. Indicate in election notices that coverage may not be added under separate plans if employee was not covered under the plan at the time of the separation from service or the employee does not elect to continue that coverage at the time of the qualifying event.</td>
</tr>
</tbody>
</table>

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*Note: The city should seek legal advice before taking this approach.*